Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 232 of 1964.

UNITED STATES OF AMERICA,
Appellant,

v.

BOSTON AND MAINE RAILROAD ET ALS.,
Appellees.

MOTION OF THE APPELLEES PATRICK B. McGINNIS, GEORGE F. GLACY AND DANIEL A. BENSON TO AFFIRM.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

MOTION OF THE APPELLEES PATRICK B. McGINNIS, GEORGE F. GLACY AND DANIEL A. BENSON TO AFFIRM.

The appellees Patrick B. McGinnis, George F. Glacy and Daniel A. Benson, pursuant to Rules 16(1)(c) and 35 of the Revised Rules of this Court, move that the order of the District Court of December 3, 1963, dismissing count I of the indictment, be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Opinion Below.

This is an appeal from an order of the District Court for the District of Massachusetts, dated December 3, 1963, dismissing count I of a two-count indictment against the Boston and Maine Railroad and three of its present or former officers or directors, charging violation of §10 of the Clayton Act, October 15, 1914, c. 323, §10, 38 Stat. 734 (15 U.S.C. §20).

The opinion of the District Court, by Sweeney, Chief Judge, allowing motions of the Railroad and the three individual defendants charged in this count, is printed in the Appellant's Jurisdictional Statement at pages 17 and 18. See *United States* v. *Boston & Maine R.R.*, 225 F. Supp. 577.

Question Presented.

The indictment charges that the Railroad, when its president and director, McGinnis, and its selling officer in the particular transaction, Glacy, "had a substantial interest in such other corporation," referring to International Railway Equipment Corporation, sold to said corporation, without competitive bidding, eight stainless steel passenger cars and two stainless steel combination baggage coaches; and that McGinnis knowingly voted for, and McGinnis, and Glacy and Benson, both vice-presidents, knowingly directed the act "and aided and abetted in said violation."

The indictment did not define the "substantial interest" which it alleged McGinnis and Glacy had in the purchasing corporation. In compliance with an order for particulars, the Government defined the situation, however, in the following terms:

> "The substantial interest of defendants McGinnis and Glacy in defendant International consisted of an

understanding, agreement, relationship, arrangement and concert of action among the said defendants McGinnis, Glacy, and International, and others, for, among other things, the purpose of producing profits for International from dealings by it in property acquired from the B & M through the intervention, direction or assistance of defendants McGinnis, Glacy, and Benson, and pursuant to which defendants McGinnis, Glacy, and Benson were to and did receive substantial monies."

The question presented* by this motion is whether §10 of the Clayton Act, quoted below, applied to dealings between a common carrier and another corporation where—

(*a*) there are no interlocking directorates or officers between the carrier and the other corporation, and

(*b*) the only relationship alleged is an "understanding" among certain officers and directors of the carrier and the other corporation that the former would receive personal profits from such dealings.

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*The question presented is narrowed under 18 U.S.C. §3731 to the issue of statutory interpretation. Although the defendants also moved, at an earlier stage of the proceedings, to dismiss count I as deficient in other respects, see *United States* v. *Boston & Maine R.R.*, 1963 Trade Cases, ¶70,913 (D. Mass. 1963), the statute conferring the right of the Government to appeal from the dismissal of count I "contemplates vesting this court with jurisdiction only to review the particular question decided by the court below for which the statute provides." *United States* v. *Keitel*, 211 U.S. 370, 398 (1908). Such issues as the adequacy of the vague language of count I, irrespective of the bill of particulars, under *Russell* v. *United States*, 369 U.S. 749 (1962), are accordingly not before the Court. See also *United States* v. *Stevenson*, 215 U.S. 190, 195-196 (1909); *United States* v. *Hvass*, 355 U.S. 570, 574 (1958). In *United States* v. *Borden Co.*, 308 U.S. 188, 193 (1939), the Court noted that "this Court is not at liberty to go beyond the question of the correctness of that construction and consider other objections to the indictment."

Statute Involved.

The statute, §10 of the Clayton Act (Act of October 15, 1914, c. 323, §10, 38 Stat. 734, 15 U.S.C. §20) provides:

> "No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors, and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.
>
> "Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding, or shall do any act to prevent free and fair competition among the bidders or those desiring to bid, shall be punished as prescribed in this section in the case of an officer or director.

"Every such common carrier having any such transactions or making any such purchases shall, within thirty days after making the same, file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions, it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

"If any common carrier shall violate this section, it shall be fined not exceeding $25,000; and every such director, agent, manager, or officer thereof who shall have knowingly voted for or directed the act constituting such violation, or who shall have aided or abetted in such violation, shall be deemed guilty of a misdemeanor and shall be fined not exceeding $5,000 or confined in jail not exceeding one year, or both, in the discretion of the court."

Reasons for Granting the Motion to Affirm.

The District Court's decision is plainly right and should be affirmed. The clear language of §10, and the context of the language, permit no other conclusion than that reached below, and the legislative history confirms this result.

1. Statutory context: the antitrust laws.

At the outset, the statutory context of §10 should be noted. It is a part of the antitrust laws. §1 of the Clayton

Act specifically so provides. 15 U.S.C. §12. This Court observed that §10 "is, of course, an antitrust law" in *Minneapolis & St. Louis Railway Co.* v. *United States*, 361 U.S. 173, 190 (1959).

The statute prohibits in three extended paragraphs certain activities by carriers in the absence of bidding, and then in the fourth paragraph provides sanctions against the carrier and those who "knowingly voted for or directed" the prohibited activity or "aided or abetted in such violation." The thrust of §10 is thus against the railroad in the first instance, and its design presumably is to prevent only transactions whose impropriety the railroad should be able to control. Bidding regulations which the carrier must follow, when the statute applies, are contained in 49 C.F.R. Part 8.

Consistently with such a design, §10 prohibits transactions involving either (*a*) a common officer or director or (*b*) ownership by the carrier's officer or director of a substantial interest in the other corporation, partnership, firm or association.

2. The plain language of §10.

Do the particulars before the Court allege that McGinnis and Glacy had an interest in International? Obviously not. An agreement or understanding, of the nature referred to in the particulars, would not create at law or in equity an interest in a *corporation*. Far less could McGinnis or Glacy under such an arrangement, if proved, be in control of International or have any right to elect an officer or director of International.

Ordinary usage does not permit "interest in a corporation" to include the kind of relation here involved. A bequest of all the testator's interest in a corporation does

not include a corporate debt to the testator. *Major* v. *Major*, 106 Ind. App. 90, 96, 15 N.E. 2d 754 (1938):

> "Generally speaking, an indebtedness due from a corporation to another, even though the person to whom the debt is owing be a stockholder of the corporation, does not, because of the debt, confer upon the person to whom it is payable an interest in the corporation. It is not so generally understood. A creditor's right is superior to that of a stockholder, but he has no right because of this relationship to any voice in the management or control of the corporation, or no interest therein within the meaning of that word in accordance with its ordinary usage."

See also *Johnson* v. *Goss*, 128 Mass. 433, 436-437 (1880).

The words in the critical phrase should be construed together—"has any substantial interest in, such other corporation"—and the word "has" is important. It could not be said that the arrangement described in the particulars is susceptible of ownership.

Webster gives indeed the following description of the word "have":

> "HAVE is the general term for any relation of belonging or of being controlled, kept, regarded, or experienced as one's own . . ."

Webster's Seventh New Collegiate Dictionary, p. 381. The particulars do not indicate that there was "any relation of belonging" between McGinnis and Glacy on the one hand and International on the other. International was not "controlled" by either of them. There is no substantial basis in the particulars to infer that International was "kept, regarded, or experienced" by either of them "as [his] own."

3. Contrasting statutory provisions.

The interpretation placed on §10 by the District Court is supported by the circumstance that other statutes deal with related problems in a contrasting manner.

An important such provision is §20a of the Interstate Commerce Act, as added February 28, 1920, c. 91, §439, 41 Stat. 494, 49 U.S.C. §20a. Subsection (12) of §20a provides in material part:

> ". . . It shall be unlawful for any officer or director of any carrier to receive for his own benefit, directly or indirectly, any money or thing of value in respect of the negotiation, hypothecation, or sale of any securities issued or to be issued by such carrier, or to share in any of the proceeds thereof, or to participate in the making or paying of any dividends of an operating carrier from any funds properly included in capital account."

§20a is different from §10 of the Clayton Act in the following respects: (*a*) it appropriately is directed at the director or officer, not the carrier, and (*b*) it deals with the problem of the officer's or director's sharing in the proceeds, which is wider in application than §10, which prohibits only conflicting interests in the corporate entity.

The Interstate Commerce Commission has observed the difference in the two sections. Rejecting the argument that §20a in the field of carrier securities was a partial repeal of §10, the Commission placed emphasis upon—

> "the inclusion in the former section of paragraph (12) which has the same underlying theme as section 10 but goes a step further in forbidding an officer or director to share in any degree in profits from the hypothecation or sale of securities."

Columbia Terminals Co., 40 M.C.C. 288, 293 (1945). What the Government asks is that the Court go the same "step further" with respect to carrier equipment and supplies as Congress did with respect to securities in adopting §20a.*

Outside the context of carriers, an example of a prohibition of conflicting interests in proceeds was recently before this Court. 18 U.S.C. §434, re-enacted from earlier versions in Act of June 25, 1948, c. 645, 62 Stat. 703, prohibits government employees from acting where they are "directly or indirectly interested in the pecuniary *profits or contracts* of any corporation," etc.† (Our emphasis.) Such language might be appropriate to regulate the conduct of individuals. It would not be appropriate as an antitrust regulation applicable primarily to railroad corporations, and it is significant that Congress did not use such conflict-of-interest terminology.

18 U.S.C. §434 was construed accordingly in *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), to include the situation of a "dollar a year" governmental employee who had an indirect interest in the profits his private employer would in all likelihood realize from the transaction in which the employee participated on behalf of the government. The opinion of the Court makes

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*Another statute involving carriers which should be noted is 18 U.S.C. §660. The present indictment contains a second count based on §660. Among other things, that section prohibits officials of a carrier from abstraction or misapplication of its property or assets. (See Act of June 25, 1948, c. 645, 62 Stat. 730.)

†The full statute reads as follows: "Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisoned not more than two years, or both."

it quite clear that the employee's interest was in the "profits or contracts" and that the statute was intended to proscribe a wide varie / of cases of divided loyalty. "We think that the findings of the lower court demonstrate that, at the very least, Wenzell had an indirect interest in the contract which the sponsors were attempting to obtain." 364 U.S. at 555.*

4. The legislative history of §10.

The legislative background of §10 need not be extensively reviewed in view of the simplicity of the terms of the statute. It is worthy of note, however, that the legislative history of the critical language would require the result reached by the District Court even if the language had been ambiguous. The Congressional reports and debates turn on the concept of control.

The Clayton Act derived from H.R. 15657 of 1914, 63d Congress, Second Session. House Report No. 627, dated May 6, 1914, contains the bill as it was reported by the House Judiciary Committee with a favorable recommendation of passage. §9 of the bill dealt with interlocking directorates. It prohibited, in terms in several respects different from the ultimately enacted language, officers and directors in common between carriers and those who sold equipment to carriers. It had no reference to any other relationship, such as common control. At pp. 17-18 of the Report it was noted that §9 was intended to prevent interlocking directorates:

*In dealing with §10 as a conflict-of-interest statute, the Government's jurisdictional statement in this case is in error. Nowhere does the Government seem to recognize that §10 applies primarily to railroad corporations and not their employees. Nor does the statement even focus on the fact that §10 speaks in terms of interest in the other corporation and not in terms of interest in the transaction itself.

"The provisions of this paragraph prevent absolutely common directors or interlocking directors between corporations occupying relations to each other described therein, without any reference to the capital, surplus, and undivided profits of the corporations dealing with each other."

The concept of an "interest" which the carrier's director or officer "has" followed an objection, in a minority report by Representative Nelson, appearing in Report No. 627, Part 3, at pp. 8-9. Nelson pointed out that, while the language of the Committee's original draft might bar a common directorate, the "other corporation" could nevertheless be owned and controlled by the railroad's director or officer under the draft bill.

"Dealings between two corporations in each of which the same men have a controlling interest are likely to result in the robbery of the minority stockholders. Such transactions should be prohibited, no matter how the interlocking control may have been secured . . . [Under the draft,] they may own all the stock of such other companies."

The bill reported by the Senate Judiciary Committee on July 22, 1914, was accordingly redrawn as to §9. Senate Report No. 698. It required bidding whenever the carrier had on its board or as its president, manager or purchasing agent "any person who is at the same time an officer, director, manager, or general agent of, or who has any direct or indirect interest in" the other corporation, firm, partnership or association. The final language in the section, renumbered as §10, replaced "direct or indirect interest" with "substantial interest."

This sequence confirms what Congress intended by its plain language. Transactions in amount more than $50,000 in any one year had to be bid if the carrier had a common officer or director or if one of its own officers or directors owned a substantial interest in the other corporation. Nothing in the minority report that preceded the final draft of legislation suggested that Congress had anything more in mind.

It is historically important to realize that the original bill in H.R. 15657 had outlawed *interlocking directorates* but not stock control. The original prohibition would have been ridiculously easy to get around. The carrier's officer or director would not elect himself as the officer or director of the other corporation, but would elect his son, his agent or his lawyer. The only way in which this could be prevented was to modify the language in the natural and obvious way. The prohibition should apply, not only where there was actually a common officer or director, but also where the carrier's officer or director owned a sufficient interest to elect a relative or representative to an office or the board of the other entity.

As Senator Chilton, being one of the sponsors of the bill in the Senate, put it on September 30, 1914, under the original bill "you could have your son, your cousin, or your lawyer, or your agent upon the corporation and accomplish the same thing as if you were on the board yourself." 51 Cong. Rec. 15943. For this reason, ownership of a substantial interest was placed on precisely the same footing as a common officership or directorate.

The only case which we have found interpreting the relevant words of §10 supports our view. In *Beegle* v. *Thomson*, 138 F. 2d 875 (7th Cir. 1943), it was charged in a civil antitrust action that the defendant by using its large volume of freight haul as a club to coerce purchases of anti-splitting

irons from itself had compelled the Pennsylvania Railroad to purchase irons exclusively from the defendant. It was held that no violation of §10 was shown. "The statute creates no liability unless such an interlocking director or agency relationship exists." 138 F. 2d, at 880.

5. Strict construction.

In view of the simple and unambiguous language of §10, which is supported by the legislative history, it may not be necessary to resort to rules of construction. If there were any ambiguity, however, it would be resolved in favor of the defendants.

The familiar rule of construction is that penal statutes are to be strictly construed. As early as 1820 this Court gave the principle a classic formulation. The opinion pointed out that "The rule that penal laws are to be construed strictly, is, perhaps not much less old than construction itself." *United States* v. *Wiltberger,* 5 Wheat. 76, 95-96. The general view set forth in that opinion is that the legislative intention must be gathered from the language employed, not from other language that might have been employed. If the language does not cover the act complained of, there is no reason to extend the statute. There are many subsequent cases on the general doctrine. E.g., *United States* v. *Hartwell,* 6 Wall. 385 (1867); *United States* v. *Noveck,* 271 U.S. 201, 204 (1926); *United States* v. *Raynor,* 302 U.S. 540, 552 (1937); and *Smith* v. *United States,* 360 U.S. 1, 9 (1959).

Conclusion.

For the reasons stated, the motion of the individual defendants to affirm the judgment below should be granted

because no substantial question is presented by the appellant for decision of this Court.

Respectfully submitted,

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